Cavalier v. *Pope*.[2]

The evidence in this case does not support the plaintiff's contention that the defendant is in occupation and control of that part of the premises which was formerly occupied by the widow, Ng Meow Keng. She vacated the premises three and a half years ago and the defendant has not occupied the part vacated by her. He refuses to do so on the ground that his agreement with the widow was that she would give vacant possession of the whole premises and until she does that he will not take possession of the premises. I hold that the defendant is not in actual occupation of any part of the premises. Under the circumstances I do not see how he could be held liable for negligence or nuisance or breach of covenant for quiet enjoyment.

There is one other aspect of this case to be considered. The motive for this action by a sub-tenant is to get the premises repaired by the owner who had expressly contracted with his tenant that the tenant would be responsible for all repairs. But for the Control of Rent Ordinance, the plaintiff would have been ejected from the premises some three and a half years ago. Is it fair and equitable that the owner of the premises should now repair it at a cost of $25,000 for the convenience of the plaintiff who cannot be compelled to pay a rent of more than $50 per mensem but who may apply to the Rent Conciliation Board to have the rent reduced? In my view, in the circumstances of this case, it would be most inequitable to compel the defendant to repair the premises at such great cost when the premises are in fact more suitable for demolition.

For the above reasons I dismiss the plaintiff's claim, except in so far as it seeks a declaration. The plaintiff is ordered to pay to the defendant the costs of this action.

Claim dismissed.

Solicitors: *K. K. Bezboruah; Boswell Hsieh & Lim.*

LAGA v. UGING & ANOR.

[O.C.J. (Lee Hun Hoe J.) August 30, 1965]

[Sibu — Civil Suit No. 63 of 1964]

Land — Lease of Crown land — Indefeasibility of title — Dayak customary law — Tusun Tunggu.

The plaintiff sought a declaration that the land held by the first defendant under lease of Crown Land belonged to him by virtue of the fact that his late father held the said land under occupation ticket. The plaintiff was unable to show that the piece of land was the one held by his father. He alleged that the land office had made a mistake but did not allege fraud on the part of the first defendant.

Held: the first defendant's title was indefeasible except in the case of fraud and as the plaintiff did not dispute the first defendant's title and did not allege fraud on his part, the declaration sought must be refused.

Consideration of Dayak custom and whether land held under title by a Dayak may be disposed of by him.

Case referred to:—

(1) *Sak anak Akum & Anor.* v. *Randong Anak Chararenq* [1958] S.C.R. 104, 108.

CIVIL SUIT.

S. Sahathevan for the plaintiff.

J. V. Nayar for 1st defendant.

Lee Hun Hoe J.: This is an unusual case. Plaintiff is asking for a declaration that the land held by the first defendant under Lease of Crown Land situate in the Maradong Land District and known as Lot No. 386 containing 3.35 acres (hereinafter referred to as Lot 386) belongs to him (plaintiff) by virtue of the fact that his late father Tunjan alias Kunjan held the said land under Occupation Ticket No. 10555 (hereinafter referred to as O.T.).

The O.T. was issued to Tunjan on 27th July 1928 under Land Regulations, Order No. VIII, 1920. He was allowed an area of 3 acres rent free at Bukit Grupkan, Sungai Gumuan, true left bank. The land was not surveyed. The following conditions were attached:—

"(i) A *bona fide* commencement to bring the land under cultivation must be made within three months from the date hereof;

(ii) The area specified above shall be brought under cultivation within a period of....

(iii) As soon as the above area has been cleared, or immediately after completion of planting, application to be made for survey;

(iv) Boundaries should be kept clear, failing which, cost of clearing at survey will be borne by occupant;

(v) The lease (or licence) will run for twenty years, renewable at occupant's option, for such term and at such rent as the Government may determine at the expiration of each term;

(vi) No encroachment to be made on other occupant's land or reserves, or on public paths."

Tunjan died during the Japanese occupation. Plaintiff said that he and his mother then worked on the land which is now occupied by first defendant. After Tunjan died plaintiff's mother kept the O.T. for some four years before she handed it to plaintiff. No survey had ever been carried out. The O.T. expired in 1948. It seems that when Tunjan died no letters of administration had ever been applied for.

Strangely enough it was some time in 1963 that plaintiff became aware that the said land was occupied by first defendant and he lodged a report with the district officer, Binatang. The matter was eventually referred to the land office, Sibu. An investigation was carried out. At the same time a caveat was lodged on the said land under section 182 of the Land Code Plaintiff was advised to institute proceedings in this court to establish his claim.

The O.T. was cancelled by virtue of the Instrument of Reversion of Title under Instrument No. L. 3116/64 and was registered on 30th October 1964 after second defendant had entered appearance. I do not think plaintiff can complain about the action taken by the land office for the simple reason that the title was registered in the name of Tunjan. Neither plaintiff nor his mother had ever taken out any letters of administration. There is a sharp distinction in respect of land held under title by a Dayak and land held by a Dayak under customary tenure for which no title is usually involved. I shall say something more about this later.

Nanta anak Jati, first defendant's father, died some ten years ago. After his father died first defendant worked on his father's land. He explained that his father divided the land into two parcels — one for planting rubber and the other for padi. First defendant obtained Occupation Ticket No. 30501 for the parcel of land for planting rubber. In 1960 he applied for a title to the other parcel of land. The land was surveyed in 1962 and a title was issued to him in 1963 for the land known as Lot 386. This is the land now in dispute.

The onus is on the plaintiff to establish on the balance of probability that the land in dispute was one held by his father under the O.T. before the court is prepared to exercise its discretion to make any declaration.

Tuai Rumah Intan and Tuai Rumah Rimond corroborated the plaintiff's evidence that the land in dispute was the land held by Tunjan under the O.T. Tuai Rumah Intan said that he had helped Tunjan to farm on the land.

On the other hand Tuai Rumah Embuyang corroborated first defendant's evidence substantially. He said that he knew Nanta anak Jati cultivated the land in dispute and that when Nanta died first defendant continued to cultivate the said land. He was most emphatic that Tunjan and plaintiff had never cultivated the said land. He pointed out that the said land is nearer to his longhouse. This is supported by the plan (Exhibit P. 4) which indicated that Rumah Embuyang is about a mile away from Lot 386 while Rumah Intan and Rumah Rimond are both over two miles away from Lot 386. Further his evidence that he has jurisdiction over the area where the land in dispute is situated has never been challenged.

Having seen and heard these witnesses I find that Tuai Rumah Embuyang is a more reliable witness than Tuai Rumah Intan and Tuai Rumah Rimond. I find Tuai Rumah Embuyang to be an honest and truthful witness. On the other hand Tuai Rumah Rimond certainly admitted that part of what he said came from what he heard from others. Both Tuai Rumah Intan and Tuai Rumah Rimond tried to persuade me to believe that their longhouses are nearer to Lot 386. The plan (Exhibit P.4) suggests otherwise. Is it possible that they are thinking of another piece of land and not Lot 386? At any rate they have the grace to refrain from saying that they have jurisdiction over the area in which the land in dispute is situated. I form the impression that they were merely doing their best to support plaintiff for reasons known to themselves. In my view they are not sincere and truthful witnesses.

Mr. Kong Yu Tsan, the land officer, was subject to penetrating cross-examination and had come out well. He explained that there was no record to show that the land held under the O.T. had ever been surveyed. Plaintiff was unable to satisfy the land office as to the exact parcel of the land claimed. It was not disputed that certain land was allocated to Tunjan. However, it was not known whether Tunjan actually occupied the land after he had obtained the O.T. According to Mr. Kong when a person obtained an occupation ticket for land which was not surveyed he should approach the land office when he had worked on the land and had his land surveyed. It is not the responsibility of the land office to locate the land unless it had previously been surveyed. The true location of the land held under the O.T. is unknown. At any rate following plaintiff's report to the district officer, Binatang an investigation was carried out to pinpoint the location of the land held under the O.T. However, the land office was not satisfied that the land held under the O.T. is the same piece of land held under Lease of Crown Land known as Lot 386. I find Mr. Kong's evidence most helpful. I have no reason to disbelieve him.

One thing is clear, that is, first defendant's title is indefeasible except in the case of fraud, see section 132 of the Land Code. Mr. Sahathevan, counsel for plaintiff, indicated that first defendant's title is not disputed and fraud is not alleged. But he submitted that the land office had made an error in this case. It is, of course, for plaintiff to show the court wherein lies the error. Mr. Kong had pointed out that the person who wanted the land surveyed had to point out the location to land office presumably to the surveyor. Tunjan, during his life time, had never taken the trouble to have his land surveyed. This dispute would not have arisen had he done so as soon as he had worked on the land.

It is not disputed that Tunjan owned a piece of land under the O.T. It is also not disputed that the land would go to plaintiff eventually in accordance with the Dayak customary law of inheritance. When Tunjan died plaintiff's mother was probably holding the land in trust for plaintiff who was then still a minor. The

question is "where is the exact location of that piece of land?"

Unlike real property not held under title, real property held under title by a Dayak may be disposed of by him without restriction. For authority I refer to *Sat anak Akum & Another* v. *Randong anak Charareng* [1] where Lascelles J. in his judgment at page 108 said this:—

"No one has argued that a Dayak may not dispose of his own property, real or personal, during his lifetime. By this I mean property he has acquired himself during his lifetime and which is not restricted in any way. A Dayak, for example, who is the registered owner of a rubber garden with an unrestricted title can certainly dispose of it during his lifetime without any hindrance by adat and I see no reason whatsoever why he should not do so by will, even if he does leave it to someone who would not on intestacy inherit it by customary law."

In the case of untitled property the position is explained in the *Tusun Tunggu* which applies to the Dayaks of the Third, Fourth and Fifth Divisions. The *Tusun Tunggu* was the result of an attempt to codify the *adats* which prevail among the Dayaks of these Divisions. At page 22 of the *Tusun Tunggu* in respect of the Third Division the following is recorded:—

"7. Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognised custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

In former days there were no restrictions on anyone felling jungle provided that he did not destroy valuable commercial trees such as gutta, jelutong and engkabang. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.

No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this Division, and Dayaks seem to forget this custom.

There are no other ways in which Dayak can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land 'temuda' and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right."

It is not disputed that when a Dayak dies his property will be distributed according to the Dayak custom of inheritance. The rights of the beneficiaries are defined by customary law. But there is nothing to exempt Dayaks from the Administration of Estates Ordinance (Cap. 80) (The Laws of Sarawak 1948 Revised Edition).

In my judgment on the evidence I hold that plaintiff has not discharged the onus that the land known as Lot 386 is the same piece of land which was held by Tunjan under the O.T. In any event plaintiff has no claim against first defendant since he did not dispute the latter's title and did not allege fraud on the part of first defendant. In the exercise of my discretion I therefore decline to make the declaration asked for. Accordingly plaintiff's application for declaration against both defendants is refused and his claim for an order of revocation against second defendant is dismissed with costs to be taxed.

Application refused.

VICTORIA HOTEL v. HO SEE TECK

[O.C.J. (Winslow J.) September 3, 1965]

[Singapore — Suit No. 1007 of 1965]

Landlord and Tenant — Licence — Irrevocable licence acquired after termination of partnership — Whether licence can be revoked.

The plaintiffs carried on business as hoteliers. It appeared on the evidence that the proprietor of the plaintiff firm originally entered into a partnership with the defendant and another person to run the business of a bar and restaurant on the ground floor of the hotel. Subsequently the partnership was terminated and the defendant claimed that he was then given the exclusive right to run the restaurant business in consideration of a sum of $6,000 paid by him, for so long as the defendant could personally continue to run the said restaurant and for so long as the plaintiffs carried on their hotel business. The plaintiffs contended that the partnership was still in existence and they purported to revoke the licence granted to the partnership to run the joint business, by giving the defendant three days notice terminating the arrangements and requiring him to vacate the premises.

Held: (1) on the facts the partnership had been terminated and the defendant had obtained an irrevocable contractual licence to run the restaurant under an oral agreement intended to be binding and supported by consideration and which was in fact acted upon;

(2) therefore the plaintiff's claim to have possession of the premises must be dismissed.

Cases referred to:—

(1) *Thompson* v. *Park* [1944] 2 All E.R. 477.

(2) *Kerrison* v. *Smith* [1897] 2 Q.B. 455.

(3) *Winter Garden Theatre Ltd.* v. *Millenium Productions Ltd.* [1947] 2 All E.R. 331.

(4) *Millenium Productions Ltd.* v. *Winter Garden Theatre Ltd.* [1946] 1 All E.R. 678.

(5) *Errington* v. *Errington* [1952] 1 All E.R. 149.

CIVIL SUIT.

T. C. Cheng for the plaintiff.

J. C. Chen for the defendant.

Winslow J.: The plaintiffs are proprietors of Victoria Hotel which commenced business presumably as hoteliers at 87 Victoria Street on 4th September, 1956.